STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2006
v	No. 262005 Oakland Circuit Court
MICHAEL PAUL JUDON, Defendant-Appellant.	LC No. 03-191615-FH

Before: Fitzgerald, P.J., and Markey and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree home invasion, MCL 750.110a(2). Defendant was sentenced to 13 to 40 years' imprisonment. We affirm.

Defendant first argues that the on-scene identification procedure used by police violated his state and federal constitutional rights to due process of law. Defendant failed to properly preserve this issue by making a motion to either suppress the identification testimony or for a hearing regarding the suggestiveness of the pretrial identification procedure. *People v Daniels*, 163 Mich App 703, 710-711; 415 NW2d 282 (1987). Hence, we review defendant's unpreserved claim for plain error that affected his substantial rights. Reversal is merited only if defendant is actually innocent or the alleged error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant contends that he was denied his constitutional right to counsel at the pretrial identification that occurred outside of his residence. Defendant, however, did not have a constitutional right to counsel at that identification. The Michigan Supreme Court has determined that the right to counsel attaches only to corporeal identifications conducted at or after the initiation of adversarial judicial criminal proceedings. *People v Hickman*, 470 Mich 602, 603; 684 NW2d 267 (2004). In holding that there is no constitutional right to counsel until the initiation of adversarial judicial criminal proceedings, the Michigan Supreme Court explicitly overruled *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), upon which defendant partially relies. *Hickman, supra* at 603-604. Because the identification procedure defendant challenges occurred before the initiation of adversarial judicial criminal proceedings, defendant did not have a right to counsel and, thus, there was no denial of due process.

Defendant alternatively argues that the on-scene identification was so unduly suggestive that it denied him due process and his right to a fair trial. As indicated by *People v Johnson*, 59 Mich App 187; 229 NW2d 372 (1975), the identification here is not inherently prejudicial, but rather, a reasonable police practice:

> While we agree that there may be some element of suggestiveness where a suspect is viewed alone in an 'in-the-field' identification proceeding, we are nevertheless of the opinion that such an identification procedure is a reasonable police practice. The reasons are twofold. First, this type of identification proceeding allows confirmation or denial of an identification while the memory of a witness is still fresh and accurate. Second, identifications of this type expedite the release of innocent suspects. [*Johnson, supra* at 190.]

This Court stated in *People v Winters*, 225 Mich App 718, 728; 571 NW2d 764 (1997), that "[s]uch on-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance."

At trial, a police officer testified that the purpose of the on-scene procedure was to eliminate defendant from suspicion. The procedure took place approximately 15 minutes after the victim witnessed the intruder in her home, while the intruder's appearance was still fresh in her mind. The police did not inform the victim that they apprehended a man that they believed to be the intruder, but merely told her that they wanted her to see if the man was in the area when they drove by. Although defendant was the only black male in the vicinity, the victim immediately identified defendant as the intruder based not only on his complexion, but his size, physique and clothing.

"Furthermore, any possible prejudice or suggestiveness inherent in an 'in-the-field' type of identification proceeding can be argued by the defendant, since at trial, a defendant not only may have an evidentiary hearing to determine the fairness of a confrontation but also may rigorously cross-examine a witness on the basis of his identification of a defendant." *Johnson, supra* at 190. Defendant's attorney questioned the victim about her ability to perceive and identify defendant as the intruder and argued that the identification procedure was unduly suggestive and unreliable. Defendant, therefore, raised the issue of whether the victim correctly identified him as the intruder to the jury, albeit unsuccessfully. Defendant, moreover, never moved for a hearing to determine whether the victim had an independent basis for her in-court identification of defendant as the intruder and cannot now claim this as error. To hold otherwise would allow defendant to harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Accordingly, any objection in the latter regard was waived, and there is no error to review. *Id.* at 215-216.

Defendant next asserts that there was insufficient evidence to support his conviction for first-degree home invasion. A sufficiency of the evidence claim is reviewed de novo to determine whether a rational factfinder could have concluded that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v McGhee*, 268 Mich App 600, 612; 709 NW2d 595 (2005).

In deciding whether there is sufficient evidence to support defendant's conviction, direct and circumstantial evidence is viewed in the light most favorable to the prosecution. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id.* The trier of fact is in a better position to determine the credibility of witnesses and weight of the evidence, so its factual conclusions are given deference. *Wolfe, supra* at 514-515.

The offense of first-degree home invasion requires the prosecution to prove that defendant either broke and entered a dwelling or entered without permission, with the intent to commit a felony, larceny, or assault in the dwelling, or that he actually committed a felony, larceny, or assault while entering, present in, or exiting the dwelling, and that defendant was either armed or another person was lawfully present in the dwelling. *People v Sands*, 261 Mich App 158, 162; 680 NW2d 500 (2004); MCL 750.110a(2).

Defendant first argues that there was insufficient evidence of the "breaking" element. The victim testified that the sliding glass door in the kitchen was closed before defendant entered and that defendant did not have permission to enter the townhouse. Opening a closed door is sufficient to satisfy the breaking element, even if that door is unlocked. *People v Wise*, 134 Mich App 82, 88-89; 351 NW2d 255 (1984).

Defendant alternatively argues that there was insufficient evidence that he intended or actually committed a felony, larceny or assault in the dwelling. An assault is "'an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.'" *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995), quoting *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). A battery is a forceful or violent touching of another person. CJI2d 17.1(2). When the victim screamed after seeing defendant in her kitchen, defendant moved toward and reached for her before the victim's friend intervened. Based on this testimony, there was sufficient evidence that defendant attempted to commit an assault while in the home.

Furthermore, there is evidence that defendant was intending to commit a larceny or other felony in the home. The elements of larceny are: (1) an actual or constructive taking of goods or property; (2) a carrying away of the goods; (3) the carrying away must be with felonious intent; (4) the goods or property must belong to another; and (5) the taking of the goods or property must be without the consent and against the will of the owner. *People v Cain*, 238 Mich App 95, 120; 605 NW2d 28 (1999). The evidence showed that defendant was rummaging through the victim's kitchen in the early morning hours, without permission, while wearing a stocking on his head to conceal his identity. Viewing the evidence in a light favorable to the prosecution, the jury drew a reasonable inference that defendant intended to commit a larceny while in the victim's townhouse. *Hardiman*, *supra* at 428. Therefore, there is sufficient evidence to support defendant's conviction for first-degree home invasion.

Finally, defendant asserts that his conviction should be reversed because the prosecutor failed to specify whether the charge for first-degree home invasion was based on either an assault or a larceny occurring in the home. This argument is without merit because a prosecutor is

permitted to charge a defendant under a single count using alternative theories. *People v Goold*, 241 Mich App 333, 342-343; 615 NW2d 794 (2000) (citation omitted).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael J. Talbot